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No. 04-563

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

TABLE OF CONTENTS

Page

I. AEDPA AND THE HABEAS RULES GOVERN THE APPLICATION OF CIVIL RULE 15(C)(2)2

A. This Court's Interpretation of Rule 15(c)(2) **Must Be Informed by AEDPA and the Rules Applicable to Habeas Corpus** 2

B. The Requirement of Habeas Rule 2 that a Petition State Specific Factual Grounds for Relief Contradicts Respondent's Generalized Interpretation of Rule 15(c)(2) 4

C. The Ninth Circuit's Interpretation Of Civil Rule 15(c) Is Inconsistent With AEDPA's Provisions And The Habeas Corpus Framework 7

D. The Warden's Interpretation Of Rule 15(c)(2) Would Not Result In Unfairness To Litigants 9

II. *TILLER V. ATLANTIC COAST LINE R. CO.*, 323 U.S. 574 (1945), IS COMPATIBLE WITH THE WARDEN'S POSITION THAT THE NINTH CIRCUIT'S INTERPRETATION OF RULE 15(C)(2) VIOLATES THE POLICY OF NOTICE11

III. THE NINTH CIRCUIT'S RULE DOES NOT PROVIDE FOR THE "FAIR NOTICE" REQUIRED UNDER CIVIL RULE 15(C)(2) 13

TABLE OF CONTENTS (continued)

	Page
IV. THE NINTH CIRCUIT'S RULE PRESENTS A POTENTIAL FOR SUBSTANTIAL DELAY AND PIECEMEAL LITIGATION	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Cases	
Artuz v. Bennett, 531 U.S. 4 (2000)	8
Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984)	5, 6, 12, 13
Cannon v. University of Chicago, 441 U.S. 677 (1979)	12
Conley v. Gibson, 355 U.S. 41 (1957)	4
Duncan v. Walker, 533 U.S. 167 (2001)	8, 9
E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392 (9th Cir. 1989)	7
Engberg v. Wyoming, 265 F.3d 1109 (10th Cir. 2001)	10
Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984)	12
Harris v. Nelson, 394 U.S. 286 (1969)	2, 10
Johnson v. United States, 544 U.S. ___ (Apr. 4, 2005) (No. 03-9685)	10

TABLE OF AUTHORITIES (continued)

	Page
McFarland v. Scott, 512 U.S. 849 (1994)	5
Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)	12
Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001)	12
Percy v. San Francisco General Hosp., 841 F.2d 975 (9th Cir. 1988)	12
Pitchess v. Davis, 421 U.S. 482 (1975)	2
Pliler v. Ford, 542 U.S. 225, 124 S.Ct. 2441 (2004)	7
Rhines v. Weber, 544 U.S. ___ (Mar. 30, 2005) (No. 03-9046)	3, 9, 16
Rose v. Lundy, 455 U. S. 509 (1982)	13
Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988)	7
Terrovona v. Kincheloe, 852 F.2d 424 (9th Cir. 1988)	10
Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945)	7, 11-13

TABLE OF AUTHORITIES (continued)

	Page
Wilson v. Fairchild Republic Co., Inc., 143 F.3d 733 (2d Cir. 1998)	13
Woodford v. Garceau, 538 U.S. 202 (2003)	8
Statutes	
15 U.S.C.A. § 15b	7
28 U.S.C. § 2242	1
28 U.S.C. § 2244(d)(1)	7
28 U.S.C. § 2244(d)(2)	8
28 U.S.C. § 2254	10, 13
28 U.S.C. § 2255	13
28 U.S.C. § 2401(a)	7
28 U.S.C. § 2415	7
28 U.S.C.A. § 2401(a)	7
45 U.S.C. § 51 *et seq.*	7
45 U.S.C.A. § 56	7
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	*passim*
Chapter 154	17
Chapter 153	17
Federal Rule of Civil Procedure 8(a)	4, 12

TABLE OF AUTHORITIES (continued)

	Page
Federal Rule of Civil Procedure	
15	1
15(a)	16, 17
15(c)	7, 8, 15, 17
15(c)(2)	*passim*
60(b)	2
81(a)(2)	2
Court Rules	
Rules Governing § 2254 Cases	
Habeas Rule 2	12, 15
Habeas Rule 2(c)	4-6, 12
Habeas Rule 5(a)	16
Habeas Rule 5(b) & (c)	17
Habeas Rule 11	2, 3
Rules Governing § 2254 Cases or Rules Governing § 2255 Proceedings	
Habeas Rules	4
Other Authorities	
3 J. Moore et al., *Moore's Federal Practice* § 15.19[2] (3d ed. 2004)	14
6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497 (2d ed. 1990)	6

TABLE OF AUTHORITIES (continued)

	Page
Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 (2d ed. 1947)	11
Fleming James, Jr., Geoffrey C. Hazard Jr., & John Leubsdorf, *Civil Procedure* § 4.23 (5th ed. 2001)	11
U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995)	17

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Contrary to respondent's contention, the Warden agrees that Civil Rule 15 applies to habeas petitions.[1/] Pet. Br. 10 n.5. However, unlike respondent, the Warden interprets Civil Rule 15(c)(2) as applying only when the amendment relates to facts underlying specific claims in the original petition. Respondent's position allows any amendments alleging claims "stemming from pre-trial motions, the trial and sentencing" to relate back. J.A. 17-18. His interpretation renders meaningless the limiting parameters of the relation back doctrine to habeas petitions and transforms Rule 15(c)(2) into a "rubber stamp." Of the two options presented to this Court, the Warden's interpretation of Civil Rule 15(c)(2) is the only one that comports with the purposes of AEDPA's statute of limitations, is consistent with the habeas provisions, and pays proper respect to the notice requirements of Rule 15.

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1. Thus, respondent's argument regarding the viability of 28 U.S.C. § 2242 is irrelevant.

I.

AEDPA AND THE HABEAS RULES GOVERN THE APPLICATION OF CIVIL RULE 15(C)(2)

This Court has recognized that a habeas proceeding, which is characterized under the "gross and inexact" label of a "civil" proceeding, is unique. *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969).

A. This Court's Interpretation of Rule 15(c)(2) Must Be Informed by AEDPA and the Rules Applicable to Habeas Corpus

Civil Rule 81(a)(2) states that the Federal Rules of Civil Procedure apply to "proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in . . . the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings." Habeas Rule 11 provides that the civil rules, "to the extent they are not inconsistent with any [habeas] provisions or these rules, *may* be applied." (Emphasis added.) This rule is intended to conform with this Court's approach in *Harris v. Nelson*, 394 U.S. 286 (1969), in which this Court "reiterated its commitment to judicial discretion in formulating rules and procedures for habeas proceedings." Advisory Committee Note to Habeas Rule 11. It also states that the court need not "rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus" and that it should apply "civil rules only when it would be appropriate to do so." *Id.*, citing *Pitchess v. Davis*, 421 U.S. 482 (1975) (Civil Rule 60(b) "should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254"). One of respondent's *amici* notes that Congress recognized that in some cases, the Court must exercise its discretionary authority to diverge from "the Rules" (presumably

meaning the civil rules). Miller Amicus Br. 18. The amicus brief posits that discretion only allows for a determination of whether the civil rule should be applied, not how the rule should be interpreted. *Id.* But nothing restricts this Court's authority to interpret how Civil Rule 15(c)(2) is to be applied to habeas proceedings. In fact, the text and Advisory Committee Note to Rule 11 reflects that the Court is empowered to tailor application of any civil rule in the habeas context. Because Habeas Rule 11 prevents use of civil rules when inconsistent with habeas provisions or rules, and warns against rigidly applying the civil rules when it would be inappropriate to do–Habeas Rule 11 speaks against the Ninth Circuit's interpretation of Civil Rule 15(c)(2).

Similarly, this Court's construction of Rule 15(c)(2) should be compatible with AEDPA's twin purposes of promoting finality and streamlining habeas proceedings. The Warden's position is bolstered by this Court's recent decision in *Rhines v. Weber*, 544 U.S. ___ (Mar. 30, 2005) (No. 03-9046). In *Rhines*, this Court held that AEDPA circumscribe a court's discretion to issue "stay-and-abeyance" orders for mixed petitions. Slip op. at 5-8. Likewise, AEDPA informs how Civil Rule 15(c)(2) should be applied to habeas proceedings.[2/]

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2. In *Rhines*, the Court recognized that staying a federal habeas petition frustrates AEDPA's objective of finality and undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all of his claims in state court prior to filing his federal petition. Slip op. at 6. Nonetheless, this Court found those interests outweighed when a habeas petitioner, who diligently files an unexhausted and potentially meritorious claim within the statute of limitations period, would be precluded from raising that claim absent a stay of the federal proceedings. See *id* at 8. This case obviously differs. Respondent is not merely asking for a stay to protect a timely claim; he is asking for this Court to revive an otherwise expired claim.

B. The Requirement of Habeas Rule 2 that a Petition State Specific Factual Grounds for Relief Contradicts Respondent's Generalized Interpretation of Rule 15(c)(2)

Civil Rule 15(c)(2) permits relation back when the original pleading gives sufficient notice of the substance of the plaintiff's claim. An amendment relates back "when . . . the claim or defense asserted in the amended pleading arose out of the *conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading*." Fed. R. Civ. P. 15(c)(2) (emphasis added). The sole question in this case is how to apply that rule when the amendment occurs in a collateral attack on an otherwise final criminal conviction. Respondent and his *amici* argue that under the plain meaning of Rule 15(c)(2), the relevant conduct, transaction, or occurrence that is set forth in a habeas petition is the trial and conviction since the prisoner's injury comes from the conviction and that the habeas proceeding seeks relief from that injury. Resp. Br. 10; Miller Amicus Br. 5-6; see Alschuler Br. 8-9. They ignore the actual pleading requirements of habeas proceedings in Habeas Rule 2. Equally telling is that neither respondent nor his *amici* contest the conclusion of the majority of the courts of appeals that the Ninth Circuit's interpretation of Rule 15(c)(2) will always permit relation back of an otherwise untimely amendment no matter how disparate the claims raised in the amendment are from those in the original petition. Pet. Br. 11-12; U.S. Amicus Br. 17-18.

Habeas Rule 2(c) provides that the habeas petition must: "(1) specify all the grounds for relief available to the petitioner; [and] (2) state the facts supporting each ground." See Advisory Note to Rule 2. These specific pleading requirements were also incorporated in the *pro se* form annexed to the Habeas Rules. States' Amicus Br. 4-5; see U.S. Amicus Br. 14. Thus, whereas civil cases require only notice-pleading, Fed. R. Civ. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957), "[h]abeas corpus

petitions must meet heightened pleading requirements," *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *accord id.* at 860 (Opinion of O'Connor, J.) ("[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims.") (citing Habeas Corpus Rule 2(c)). Accordingly, the "conduct, transaction or occurrence" "set forth" in a habeas petition is "the facts underlying the specific claims asserted in the original petition." Pet. Br. 6. A habeas petition cannot simply challenge a conviction, it must allege a specific claim with supporting facts. Thus, while respondent and *amici* spend considerable effort arguing that "conduct, transaction or occurrence" mean a trial, they disregard the remaining text of Rule 15(c)(2) that requires that the "conduct, transaction or occurrence" must be "set forth or attempted to be set forth in the original pleading." After all, what is set forth in the pleading is what provides the notice required for Civil Rule 15(c)(2). For habeas petitions, what is "set forth" in Rule 15(c)(2) logically refers to what is required to be set forth in Habeas Rule 2(c). U.S. Amicus Br. 8. This Court stated in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984):

> The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that the statute of limitations were intended to provide. 3 J. Moore, Moore's Federal Practice ¶ 15.15[3], p. 15-194 (1985). Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). *Because the initial "pleading"* [a right-to-sue letter] *did not contain such notice, it was not an original pleading that could be rehabilitated by invoking Rule 15(c).* (Emphasis added.)

Thus, where the pleading is insufficient and fails to provide "fair notice," Civil Rule 15(c)(2) does not apply. "A failure of notice will prevent relation back." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1497, at 85-86, 89 (2d ed. 1990).

In habeas practice, a petition setting forth claims of federal constitutional error and the facts that support them provide adequate notice of possible additional claims which may clarify or amplify the stated facts, or of possible additional claims based on different legal theories that are predicted on the same core of facts set forth in the original petition. Conversely, in light of the pleading requirements of Habeas Rule 2(c), the responding party has no reason to anticipate the filing of a brand new claim of constitutional error based on facts totally unrelated to those set forth in the original petition. Respondent argues that notice is not limited to the face of the pleading. Resp. Br. 24. However, respondent cannot reconcile that contention with either the text of Rule 15(c)(2) which requires the relevant occurrence to be stated in the "original pleading" or the Court's holding in *Baldwin County Welcome Center*, 466 U.S. at 149 n.3.

In this case, respondent sets forth three specific claims for relief in his initial timely petition. The claim which respondent sought to amend to that petition was supported by facts wholly unrelated to the facts alleged in respondent's original petition. Accordingly, the district court properly concluded that the new claim did not relate back under Civil Rule 15(c)(2) since the new claim did not arise out of the "conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."

C. The Ninth Circuit's Interpretation Of Civil Rule 15(c) Is Inconsistent With AEDPA's Provisions And The Habeas Corpus Framework

The Ninth Circuit's construction of Rule 15(c)(2), renders AEDPA's limitations period virtually ineffective because once an inmate has filed a timely habeas petition, the habeas inmate is forever free from the constraints of the statute of limitations. Respondent suggests that this result is justified because of the use of the word "application" in 28 U.S.C. § 2244(d)(1), which provides: "[a] 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Resp. Br. 20 n.7.

That section 2244(d)(1) refers only to an application rather than to claims made in the application is inconsequential. Statutes of limitations are generally directed to the commencement of an action or the filing of a complaint within a certain time period, without reference to any claims therein. *E.g.*, 15 U.S.C.A. § 15b; 28 U.S.C.A. § 2401(a); accord 28 U.S.C. § 2415; 45 U.S.C.A. § 56. Thus, the generic reference to a complaint or action does not mean that once a complaint has been filed that the statute of limitations no longer applies to bar new untimely claims. *E.g.*, *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 575, 580-81 (1945) (applied Rule 15(c) to three-year statute of limitations under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315-16 (9th Cir. 1988) (new claim did not relate back and was time-barred under 28 U.S.C. § 2401(a)); *E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir. 1989) (applied Rule 15(c) to four-year statute of limitations under 15 U.S.C.A. § 15b). Likewise, use of "application" in 28 U.S.C. § 2244(d)(1) does not mean that new claims can be added simply because a timely application is pending. *See Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2451 (2004) (Breyer, J., dissenting) (AEDPA's limitation period "requires a prisoner to file a federal habeas petition with at least

one exhausted claim within the 1-year period, and *it prohibits habeas petitioner from subsequently including any new claim.*") (Emphasis added).[3/]

While respondent recognizes that AEDPA's statute of limitations furthers finality, he argues that once a federal habeas petition is filed, the finality of a state court judgment is already put in question and therefore an amendment thereto does not "appreciably" affect the state's interest in finality. Resp. Br. 31. That is simply wrong. Certainly, additional delay occurs when the parties and a federal court have to address more claims, even if the additional claims do not lead to discovery and/or an evidentiary hearing. And even more delay occurs when an amendment alleges unexhausted claims, which then require exhaustion in state court.

Of course, there is some delay whenever relation back is allowed. Nonetheless, Rule 15(c) exists even in light of the interests in repose. However, delay is especially offensive in the habeas corpus context because it is delay in the execution of a criminal judgment, that has most likely been affirmed in one or more forums. In a habeas proceeding challenging a California conviction, the judgment would have been subject to intermediate appellate review and review by the state's highest court. A California prisoner could seek habeas review in the State's trial, appellate *and* supreme courts. Thus, unwarranted delay in habeas litigation is even more offensive than in an ordinary civil setting. *But see* Miller Amicus Br. 17.

Congress enacted AEDPA to reduce delay in the execution of state and federal sentences and to promote the principles of finality, comity and federalism. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). As noted in *Duncan v. Walker*, 533 U.S. 167

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3. For the same reason, *Artuz v. Bennett*, 531 U.S. 4 (2000) is irrelevant. *Artuz* merely explained when a state habeas application is properly filed under the tolling provisions of 2244(d)(2). It does not indicate that AEDPA's statute of limitations will not apply to amendments to a petition after the statute has run.

(2001), AEDPA's purpose and the limitations, tolling and exhaustion provisions all work to promote the filing of one federal petition *after* the prisoner has concluded proceedings in state court. *Id.* at 180-81; *Rhines*, 544 U.S. ___, slip op. at 6. Since the Ninth Circuit's rule allows an inmate to do an "end run" around the limitations period by extending the period in which he can bring claims, and since that rule decreases an inmate's incentive to exhaust all his claims in state court prior to filing his federal petition, Pet. Br. 8-15, the Ninth Circuit's interpretation is inconsistent with AEDPA's limitations, tolling and exhaustion provisions. Since that interpretation also frustrates Congress's intent to promote principles of finality, comity and federalism, which are fundamental to habeas corpus, the Ninth Circuit's application of Civil Rule 15(c)(2) is also inconsistent with the framework of habeas corpus and should not be allowed.

D. The Warden's Interpretation Of Rule 15(c)(2) Would Not Result In Unfairness To Litigants

One of respondent's *amici* asserts that a different interpretation of Civil Rule 15(c)(2) for habeas petitions would result in unfairness to litigants and cause confusion and complexity. Miller Amicus Br. 16-18. The Warden does not agree that her position amounts to a "different" interpretation of that rule. As interpreted in ordinary civil context, the Warden's interpretation of Rule 15(c)(2) does not remove all limits to the relation back doctrine. Any differences in interpretation of the rule for habeas and ordinary civil cases is explained by the fact that the rules governing habeas proceedings simply do not exist in other civil contexts. Nothing indicates that the interpretation advocated by the Warden would cause confusion regarding how Civil Rule 15(c)(2) will be applied to non-habeas civil cases–because there is no other equivalent to habeas litigation. And *amici* does not explain how a different interpretation for

habeas proceedings creates unfairness since "the [habeas] proceeding is unique," *Harris*, 394 U.S. at 294.

This Court should reject the suggestion to favor the Ninth Circuit's interpretation of Civil Rule 15(c)(2) because the majority of habeas corpus petitions are filed by *pro se* inmates. Alschuler Amicus Br. 27-28. Generally, appointment of counsel in 28 U.S.C. § 2254 cases are at the court's discretion. *Engberg v. Wyoming*, 265 F.3d 1109, 1122 (10th Cir. 2001); *Terrovona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988). While the appointment of counsel may result in an amended petition that adds new claims, that is not always the case. The appointment of counsel can result in the winnowing of claims or clarification of the facts and argument presented to the court. And, as evidenced by this case, counsel will likely have ample opportunity to file a timely amendment if the *pro se* inmate makes the effort to file his federal habeas petition as soon as possible. Here, respondent filed his initial federal petition (which only required him to fill out a form and attach a copy of his petition for review to the California Supreme Court, Pet. App. G5-6), nine months after his state conviction became final. Resp. Br. 31-32 n.17. His appointed counsel was able to file an amended petition eight months thereafter, after the court granted unopposed extensions of time. *Id.* Thus, had respondent bothered to file his initial petition within four months of when his conviction became final, the amended petition would have been timely. *See Johnson v. United States*, 544 U.S. ___ (Apr. 4, 2005) (No. 03-9685), slip op. at 15 (this Court noted *pro se* status did not excuse lack of diligence). Basically, the longer a *pro se* inmate waits to file his habeas petition, the less time his appointed attorney will have to file an amendment to the petition should one be deemed necessary. Thus, the Warden's position gives additional incentive for prompt filing of the habeas petition.

In any event, this Court's ruling in this case affects not only *pro se* filings, but filings from represented capital inmates. If the Ninth Circuit rule is upheld, it is likely that such inmates

will file amendments after expiration of the limitations period to add new claims to delay their execution.

II.

TILLER V. ATLANTIC COAST LINE R. CO., 323 U.S. 574 (1945), IS COMPATIBLE WITH THE WARDEN'S POSITION THAT THE NINTH CIRCUIT'S INTERPRETATION OF RULE 15(C)(2) VIOLATES THE POLICY OF NOTICE

In *Tiller*, this Court addressed the question of whether a new claim based on a different theory that was added by amendment after the statute of limitations period related back to the original complaint. 323 U.S. at 576, 580. This Court found that it did because both the original complaint and the amended complaint "related to the same general conduct, transaction and occurrence which involved the death of the deceased" and therefore the respondent "had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Id.* at 581. In *Tiller*, one of the original claims and the new claim added by amendment referred to the improper lighting of the train, albeit the new claim alleged a failure to have a light in the front as well as the back of the locomotive. *Id.* at 577, 581. Unquestionably, the original and the amended complaints alleged related facts and pertained to the same railroad accident that injured the plaintiff.[4/]

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4. Respondent cites authority suggesting *Tiller* did not open the door for claims based on new facts totally unrelated to claims in an initial petition. Resp. Br. 18, citing Fleming James, Jr., Geoffrey C. Hazard Jr., & John Leubsdorf, *Civil Procedure* § 4.23 at 278 (5th ed. 2001) (limitations policies are not threatened by amendments "even when the new ground involves a *variation* in the facts") (emphasis added) and Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 at 731 (2d ed. 1947) ("*unless*

Tiller was a garden variety tort case which could not speak to Rule 15(c)'s application to post-AEDPA petitions and their more stringent pleading standards under Habeas Rule 2.[5/] However, *Tiller*'s analysis is consistent with the Warden's position that amendments must "relate back" to a particular "core set of facts" underlying a specific claim of constitutional error that has been set forth in the original petition.

By holding that a civil complaint pleading an injury (e.g., wrongful death) puts the responding party on notice of all causes of action leading up to that injury, *Tiller* confirms that a claim based on a new theory can relate back to a timely pleading so long as the initial pleading was sufficient to provide adequate notice. *Baldwin County Welcome Ctr.*, 466 U.S. at 150 n.3. But, as discussed, what is a sufficient pleading in a typical civil case is not a sufficient pleading for habeas corpus. Compare Fed. R. Civ. P. 8(a) with Habeas Rule 2(c). A habeas petitioner cannot meet his pleading requirement by simply alleging that he is suffering the injury of unlawful detention. Such a broad pleading does not alert the responding party as to the constitutional basis for relief or the facts in support thereof, let alone any future claims that may be made. It would not provide the notice required under Civil Rule 15(c)(2), and would most

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there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment will be allowed") (emphasis added). Further, case law following *Tiller*, support that view. Pet. Br. 20, citing *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001); *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 977-79 (9th Cir. 1988); *Moore v. Baker*, 989 F.2d 1129, 1130-32 (11th Cir. 1993); *Fuller v. Marx*, 724 F.2d 717, 720-21 (8th Cir. 1984); see also cases listed in States's Amicus Br. 16-17.

5. While Congress is, of course, assumed to know the law, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), and thus the existence of the relation back doctrine under Civil Rule 15(c)(2) and the *Tiller* case, Miller Amicus Br. 18 n.6, it should be equally assumed that Congress knew that *Tiller* could not have meant to dictate how Civil Rule 15(c)(2) would be applied in a habeas setting. That question was never before the Court.

likely be dismissed under Habeas Rule 4. Resp. Br. 33.

Respondent acknowledges that under Civil Rule 15(c)(2), not all claims will relate back to the date of the filing of the initial pleading. Resp. Br. 19. And *Tiller* did not eliminate all restrictions to the relation back doctrine under Civil Rule 15(c)(2). But that is precisely the outcome under respondent's point of view–i.e., all claims raised in a habeas petition that challenges a judgment or conviction under 28 U.S.C. §§ 2254 and 2255 will relate back to the timely filed petition.

III.

THE NINTH CIRCUIT'S RULE DOES NOT PROVIDE FOR THE "FAIR NOTICE" REQUIRED UNDER CIVIL RULE 15(C)(2)

One of respondent's *amici* point to AEDPA's exhaustion requirement as additional support that a federal habeas petition provides notice of all potential claims stemming from a criminal judgment since claims in the federal petition would already have been litigated in state court. Alschuler Amicus Br. 9-10. That argument fails on two points. First, as already noted, Civil Rule 15(c)(2)'s fair notice requirement is predicated on what is contained in the original pleading. Fed. R. Civ. P. 15(c)(2); *Baldwin County Welcome Ctr.*, 466 U.S. at 150 n.3. Second, *amici* fails to consider the flip side of this argument–that the state reasonably expects inmates to meet the "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U. S. 509, 520 (1982); *cf. Wilson v. Fairchild Republic Co., Inc.*, 143 F.3d 733, 739 & n.6 (2d Cir. 1998) (opposing party did not have fair notice of new claims because new claim had not been administratively exhausted and thus could not have been properly included in the original pleading). The total exhaustion rule is undermined by the Ninth Circuit's interpretation of Rule 15(c)(2), which permits relation

back regardless of whether the amended claim had been previously asserted.

Respondent cannot dispute that *entirely different* evidence is required to prove his coerced confession claim. *See* 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-83, 15-84 (3d ed. 2004) (in determining if a claim arose from same conduct, transaction or occurrence, one factor the court should consider is whether plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim). Instead, he insists that presentation of a Confrontation Clause claim put the Warden on notice of the untimely coerced confession claim because both "arose on successive days during the trial and both challenged the unconstitutional admission of pretrial statements" during the case-in-chief. Resp. Br. 21-23.

The presentation of a single timely claim of evidentiary error with specific facts supporting that precise claim does not provide notice of other future claims and supporting facts. Pet. Br. 21-22. It does not even provide notice of other types of *evidentiary error*. For example, a single Confrontation Clause claim of evidentiary error does not provide fair notice of other claims of evidentiary error such as:

- improper lineup for identification of the defendant
- no chain-of-custody of seized evidence
- statements taken without reading warnings regarding right to counsel
- testing of evidence by non-established means
- hearsay with no exceptions
- no basis for admission of prior misconduct
- incriminating statements by co-defendant
- "testimonial" hearsay
- involuntary statements

A habeas petitioner would be relying on one set of facts to prove the original claim of evidentiary error and on an entirely

different set of facts to prove the other above-mentioned claims of evidentiary error. Respondent's position would make a sham of the notice policy in light of the pleading requirements under Habeas Rule 2 and the text of Civil Rule 15(c)(2) that requires that both the original and amended pleading relate to the same "transaction, conduct or occurrence."[6]

Respondent's concern that the Warden's interpretation of Civil Rule 15(c)(2) will preclude review of belated meritorious claims is unfounded. In reality, it is an argument against AEDPA's statute of limitations. The position advocated by the Warden, i.e., that "conduct, transaction or occurrence" be construed "as the facts underlying the specific claims asserted in the original petition," Pet. Br. 6, is compatible with civil practice. It allows for relation back of an untimely amendment to cure technical defects, to amplify or clarify facts set forth in the initial pleading or to add legal theories relating to the set of facts previously set forth. Pet. Br. 27-28; U.S. Amicus at 8. But unlike the Ninth Circuit's rule, it does not work to rewrite Civil Rule 15(c) so that the limits to the relation back doctrine are inapplicable to habeas challenges to a judgment of conviction or sentence.

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6. Respondent also argues that even if the initial petition did not put the Warden on notice of the coerced confession claim, the Warden was nonetheless on notice because the claim had been raised in the lower court. Resp. Br. 24. Prior to jury selection, the state court denied the motion to suppress respondent's statements. CT 583-590, 591, 596. However, the claim was never raised again at trial, new trial motion, or appeal, CT 697-706; RT 722-732, 1556-1563; Pet. App. E, or in the original habeas petition. The Warden could reasonably conclude that petitioner had abandoned the claim.

IV.

THE NINTH CIRCUIT'S RULE PRESENTS A POTENTIAL FOR SUBSTANTIAL DELAY AND PIECEMEAL LITIGATION

Respondent and *amici* assert that the majority of inmates have no incentive to delay habeas proceedings. Resp. Br. 32. Even if true, that is not the point. It does not matter that delay is not the motivating factor for filing a new claim after the limitations period has expired. The statute of limitations is undermined regardless of the person's intent.[7]

While acknowledging that capital inmates may seek delay, *Rhines*, 544 U.S. ___ , Slip Opn. at 7 (observing that "capital petitioners might deliberately engage in dilatory tactics"), respondent and *amici* believe that sufficient safeguards exists to prevent inmates from "gaming" the system. Resp. Br. 31; Alschuler Amicus Br. 23-24; Miller Amicus Br. 19-21. Respondent ignores that an inmate with numerous claims only has to properly plead a single one in order to keep the door open for the addition of new claims. Resp. Br. 33.

Respondent and *amici* also rely on the district court's discretion to preclude untimely amendments under Civil Rule 15(a). Under that rule, inmates can amend their pleadings once "as a matter of course" any time before a responsive pleading is filed. Fed. R. Civ. P. 15(a). The suggestion that the State can quickly file an unsolicited answer to eliminate that right is unreasonable. Alschuler Amicus Br. 24. The realities of legal practice require that the State first file a responsive pleading in those cases in which responsive pleadings are actually due. Habeas Rule 5(a) (no answer required unless ordered). In

7. The delay occasioned by the filing of an unexhausted claim could have been longer in this case had the state court been less prompt in ruling on respondent's exhaustion petition. In his opposition to the Warden's motion to dismiss, Pet. App. H7, respondent asked for "stay-and-abeyance," Resp. Opp. to Motion to Dismiss (filed on May 6, 1999).

addition, the filing of an answer in a capital case is generally no easy task. *See* Habeas Rule 5(b) & (c).

Furthermore, any inmate may forestall the filing of a responsive pleading by filing an amendment containing unexhausted claims. Such a filing will frequently be met by a motion for dismissal for failure to exhaust. As previously discussed, such motions do not count as responsive pleadings. Pet. Br. 16.

After a responsive pleading has been filed, Rule 15(a) still provides that leave to amend "shall be freely given." Rule 15(a) simply does not provide the same protections against untimely expansion of the petition as Civil Rule 15(c). If it were otherwise, there would be no need for any limiting parameters in the relation back rule.[8]

Finally, an inmate need not be concerned that his petition will be denied before he can amend it. See Resp. Br. 33. Even non-capital cases take considerable time to resolve. See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995) (the average (mean) number of days for processing a petition is 477 days when resolved on the merits and 268 days when disposed of on procedural grounds). More complex capital cases will take even longer time. *Id.* at 25 (the average (mean) processing time for death penalty cases with three or more issues was 925 days). In any event, an inmate need not wait until the last possible

8. The strict limitations on amendments in Chapter 154 of AEDPA are irrelevant. Congress obviously intended to limit amendments in capital cases in which states met certain conditions for appointment of counsel. However, those limitations shed no light on how Civil Rule 15(c) applies in Chapter 153 cases. Congress did not make any specific changes in amendments for Chapter 153 cases because it could have assumed that Rule 15(c) would be applied as the majority of circuits have held it should be applied, i.e., the position advocated by the Warden. Even without Chapter 154's particularly stringent protections in capital cases, the States are entitled to protections against untimely amendments under Chapter 153.

moment to amend his petition in order to frustrate AEDPA's statute of limitations.

AEDPA was designed to prevent the very type of delay that the Ninth Circuit's rule allows.

CONCLUSION

For the reasons stated in the Petitioner's Brief On The Merits, and by the *amici curiae* briefs in support of the petitioner, and for those reasons stated herein, the Warden respectfully asks that the Ninth Circuit opinion be reversed.

Dated: April 4, 2005

Respectfully submitted,

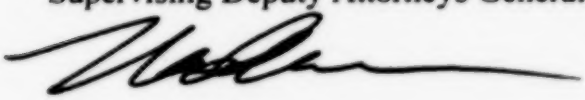
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner